ORIGINAL

No. 93-5209

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DARREN J. CUSTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that petitioner may not collaterally attack two previous state convictions used for sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. 924(e).

2. Whether attempted breaking and entering under Maryland law constitutes a "violent felony" for purposes of 18 U.S.C. 924(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 988 F.2d 1355. The opinion of the district court (Pet. App. 11a-16a) is reported at 786 F. Supp. 533.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1993. A petition for rehearing was denied on April 30, 1993. The petition for a writ of certiorari was filed on July 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of possessing

cocaine, in violation of 21 U.S.C. 844,[1/] and of being a felon in possession of a firearm, in violation of 21 U.S.C. 922(g). He was sentenced to 235 months in prison, to be followed by three years of supervised release.

1. On July 1, 1991, two police officers approached an intersection known to be the site of extensive drug activity in Baltimore, Maryland. Several persons were standing on the corner in front of a convenience store. One of them called out a warning that officers were nearby. Petitioner fled into the store. As the officers followed petitioner into the store, they heard a "thump" in the area near the right wall, where petitioner was standing between two video machines. Pet. App. 3a-4a; Gov't C.A. Br. 3-4.

Petitioner tried to leave the store, but the officers stopped him. They searched the area near the right wall and found a loaded .38 caliber revolver on the floor between the two video machines. When petitioner was arrested, he dropped a small bag of cocaine. The officers also found 18 similar bags of cocaine against the wall next to the video machines. The next day, petitioner told a detective that the firearm belonged to him, and that he was an enforcer for a drug distribution ring. Pet. App. 4a; Gov't C.A. Br. 5.

1/ Petitioner was charged with possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The jury, however, found him guilty of the lesser included offense of simple possession. The jury acquitted petitioner of using of a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c).

2. Prior to trial, the government filed a notice that it would seek an enhanced penalty under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). Section 924(e) prescribes a 15-year mandatory minimum prison term for a defendant who violates 18 U.S.C. 922(g)(1) and "has three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from each other." The notice charged that petitioner had three prior state felony convictions: (1) a 1985 Pennsylvania robbery conviction; (2) a 1985 Maryland burglary conviction; and (3) a 1989 Maryland attempted burglary conviction. Pet. App. 4a; C.A. App. 258-259.

Petitioner challenged the use of his two Maryland convictions for sentence enhancement under Section 924(e). First, he argued that his 1985 burglary conviction had been obtained unconstitutionally because he had received ineffective assistance of counsel and had not entered a voluntary and intelligent guilty plea. Pet. App. 4a; C.A. App. 163-165. Petitioner challenged the constitutionality of his 1989 conviction on the ground that it had been based upon a "stipulated facts" trial; that the effect of such a trial was the same as that of a guilty plea; and that he had not been adequately advised of the rights he was waiving. Pet. 4; Pet. App. 4a. In addition, petitioner argued that his 1989 Maryland conviction was not a "violent felony" conviction for purposes of Section 924(e)

because he was convicted of attempted breaking and entering and not attempted burglary.[2/] Pet. App. 4a; C.A. App. 165-176.

The district court refused to entertain petitioner's collateral attacks on his two Maryland convictions. Pet. App. 12a-15a; C.A. App. 163-165, 175-176. It noted that "[u]nlike the statutory scheme for enhancement of sentences in drug cases [21 U.S.C. 851], the [ACCA] provides no statutory right to challenge prior convictions relied upon by the Government for enhancement." Pet. App. 13a-14a. The court then concluded that the Constitution prohibits the use of a prior conviction for sentence enhancement only when there was complete denial of counsel in the prior proceeding. Id. at 14a, citing Gideon v. Wainwright, 372 U.S. 335 (1963); United States v. Tucker, 404 U.S. 443 (1972); and Burgett v. Texas, 389 U.S. 109 (1967). Because petitioner was represented by counsel in the two Maryland cases, the district court found no occasion for any collateral review of his prior convictions in the sentencing proceedings. Pet. App. 15a. The court also ruled that petitioner's 1989 Maryland conviction was a "violent felony" for purposes of Section 924(e), regardless of whether it was for attempted burglary or attempted breaking and entering. C.A. App. 171-175.

Based on an offense level of 33 and a criminal history category of IV, the district court determined that petitioner's

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2/ At the time of the district court proceedings, the state court records indicated that petitioner's 1989 conviction was for attempted burglary. While his appeal was pending, the state court entered an order deleting the references to "attempted burglary" and substituting "attempted breaking and entering" in petitioner's court file. Pet. App. 9a n.3.

Guidelines range was 235-293 months in prison. The court sentenced petitioner to 235 months in prison. C.A. App. 191, 196.[3/]

3. The court of appeals affirmed. Pet. App. 1a-10a. The court noted that in Tucker and Burgett, this Court held that defendants may collaterally attack prior convictions used for sentencing purposes when the ground for challenging the prior convictions is that the defendant was denied counsel. Such claims, the court of appeals explained, are "different in kind from other constitutional errors" because the complete denial of counsel leaves the judicial system with "no assurance that the prior conviction reliably establishe[d] the defendant's guilt." Pet. App. 6a-7a. And because such claims "will ordinarily lend themselves to facial review from * * * state court documents offered by the government to establish the conviction," the court found that the burden of adjudicating claims of complete deprivation of counsel "should * * * not be a heavy one." Id. at 7a.

In contrast, the court of appeals found that permitting collateral attacks upon prior convictions used for sentence enhancement based on any constitutional claim would create significant practical impediments to the implementation of the sentence enhancement scheme. Pet. App. 7a.

3/ After sentencing, the district court granted petitioner's motion for a new trial because the two police officers who were witnesses in this case had been indicted in state court for perjury in an unrelated case. Pet. App. 15a-16a. The court of appeals reversed, finding that the circumstances did not warrant departure from the general rule that subsequent discovery of impeachment evidence does not warrant a new trial. Id. at 6a. Petitioner has not raised that issue before this Court.

> Even where the defendant's constitutional attack has no merit, establishing the validity of convictions that may be geographically and temporally distant presents considerable practical difficulties. Many of the challenged predicate convictions will be from state courts, and the procedures of those courts are likely to be unfamiliar to court and counsel. This unfamiliarity will be compounded by the fact that the attorneys of the state that convicted the defendant will not be there to defend that state's procedures. Moreover, the "inadequacy or unavailability of state court records and witnesses" from multiple or far-flung jurisdictions may further complicate the process.

Ibid. (citations omitted). The court added that "permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism." Ibid.

The court of appeals accordingly held that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." Pet. App. 8a. Because petitioner's challenges to his two prior Maryland convictions did not satisfy that standard, the court of appeals held that the district court properly declined to consider petitioner's constitutional challenge to his prior convictions at sentencing. Id. at 9a.

The court of appeals also rejected petitioner's contention that his 1989 conviction for attempted breaking and entering was not a "violent felony" for purposes of Section 924(e). Because the offense of breaking and entering under Maryland law requires breaking and entering into "the dwelling house of another," the court found that "attempted breaking and entering 'presents a serious potential risk of physical injury to another' and thus constitutes a violent felony" for purposes of Section 924(e). Pet. App. 9a-10a (citation omitted).

ARGUMENT

1. Petitioner contends (Pet. 7-15) that the courts below erred in holding that a criminal defendant may not challenge the constitutionality of prior convictions used to enhance his sentence under the Armed Career Criminal Act, 18 U.S.C. 924(e). We believe that petitioner's collateral attack upon his prior final convictions is not cognizable under Section 924(e), and that it is also not authorized by the Constitution. Because the courts of appeals are divided on those two related issues, however, we agree that the first question presented in the petition warrants this Court's review.

a. The ACCA does not require a district court to entertain a defendant's collateral attack on a prior final state conviction used for sentence enhancement under 18 U.S.C. 924(e). The relevant language of Section 924(e) enhances the sentence of any person who "violates [18 U.S.C.] 922(g) * * * and has three previous convictions by any court referred to in [18 U.S.C.] 922(g)(1) * * * for a violent felony or a serious drug offense, or both, committed on occasions different from each other."

Because Section 924(e) applies whenever a defendant "has three previous convictions" of the specified character, its plain terms

focus on the fact or existence of the prior convictions. The statutory language nowhere suggests that, in addition, prior final convictions must be subject to scrutiny for potential constitutional error before they may be counted under Section 924(e).

The definitional provision of the ACCA, moreover, makes clear that unchallenged prior convictions may be used for purposes of Section 924(e). In enumerating the limited circumstances in which a prior conviction may be excluded under the ACCA, 18 U.S.C. 921(a)(20) provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter [18 U.S.C. 921-930]." By specifying that a court may not count any conviction "which has been * * * set aside" (18 U.S.C. 921(a)(20) (emphasis added)), Congress gave strong indication that courts may rely on prior final convictions if they have not previously been set aside.

That conclusion is supported, moreover, by the general rule that a prior final conviction "carries with it a presumption of regularity." Johnson v. Zerbst, 304 U.S. 458, 468 (1938). And where, as here, prior state convictions are involved, full faith and credit principles require federal courts to respect final state court judgments, unless Congress "plainly state[s]" to the contrary. See Kremer v. Chemical Construction Corp., 456 U.S. 461, 485 (1982); 28 U.S.C. 1738.[4]

[4] In contrast with Section 921(a)(20), other federal criminal statutes have stated expressly when a defendant may collater-
(continued...)

The court of appeals' decision in this case, however, conflicts with the decisions of several other courts of appeals. See United States v. Paleo, 967 F.2d 7, 11-14 (1st Cir. 1992) (defendant may challenge validity of guilty plea underlying prior final conviction used for sentence enhancement under Section 924(e)); United States v. Gallman, 907 F.2d 639, 642-645 (7th Cir. 1990) (same), cert. denied, 111 S. Ct. 1110 (1991); United States v. Young, 979 F.2d 1280, 1281 (8th Cir. 1992) (same), cert. denied, 113 S. Ct. 1604 (1993); United States v. Cornelius, No. 92-3270 (8th Cir. July 30, 1993), slip op. 3-4 (same); United States v. Lewis, 991 F.2d 524, 526-527 (9th Cir. 1993) (competence to plead guilty in prior case), petition for cert. pending, No. 93-5142.[5] In light of the conflict among the courts of appeals on this important question of statutory interpretation, we do not oppose this Court's review of that issue.

b. The courts below correctly held that the Constitution does require consideration of petitioner's collateral attacks upon his

[4] (...continued)
ally attack a prior conviction used to enhance his sentence. For example, 21 U.S.C. 851(c) sets forth specific procedures permitting a defendant to challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense. Similarly, the now-repealed dangerous special offender statute provided that "[a] conviction shown on direct or collateral review or at the [sentencing hearing] to be invalid * * * shall be disregarded." 18 U.S.C. 3575(e) (1982).

[5] A number of decisions have also rejected on the merits constitutional challenges to prior convictions used under Section 924(e) without explicitly analyzing whether the ACCA permits such collateral attacks. See, e.g., United States v. Stewart, 977 F.2d 81, 84-85 (3d Cir. 1992), cert. denied, 113 S. Ct. 1443 (1993); United States v. Simmons, 961 F.2d 183, 186-187 (11th Cir. 1992), cert. denied, 113 S. Ct. 1591 (1993).

two prior final convictions before those convictions may be used to support an enhanced sentence. That conclusion is consistent with well-settled principles of sentencing. This Court has repeatedly held that sentencing courts may consider a broad range of factors in determining the appropriate sentence. See Chapman v. United States, 111 S. Ct. 1919, 1927 (1991); United States v. Grayson, 438 U.S. 41, 49-50 (1978); Williams v. New York, 337 U.S. 241, 246-247 (1949). As the Court explained in Chapman, a person convicted of a federal offense "is eligible for, and [a] court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." 111 S. Ct. at 1927.6/

When a prior conviction has become final, a "presumption of regularity" attaches (Johnson v. Zerbst, 304 U.S. at 468), and a court is entitled to presume that the defendant "stands fairly and finally convicted." United States v. Frady, 456 U.S. 152, 164 (1982). That presumption, moreover, has special force when the conviction results from a guilty plea. See Hill v. Lockhart, 474 U.S. 52, 58 (1985); United States v. Timmreck, 441 U.S. 780, 784 (1979). Thus, Congress may rationally use a prior final conviction to identify a defendant as a more serious offender -- without first permitting him to raise every claim of error that could have been

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6/ Petitioner has not alleged that his sentence violates the Eighth Amendment guarantee against cruel and unusual punishments.

but was not raised on appeal or in a prior collateral attack on the predicate conviction.

This Court has recognized certain limits on the freedom of Congress and the States to rely on previous convictions for use in sentencing. Specifically, the Court has held that uncounseled prior felony convictions may not be used for sentence enhancement, Burgett v. Texas, 389 U.S. 109 (1967), or for purposes of sentencing in general. United States v. Tucker, 404 U.S. 443 (1972). But those cases are not applicable here. In both Burgett and Tucker, the subsequent conviction or sentence "depended on the reliability of a past uncounseled conviction." Lewis v. United States, 445 U.S. 55, 67 (1980). Yet the complete denial of counsel in a felony case implicates "the very integrity of the fact-finding process," and an uncounseled felony conviction inherently "lack[s] reliability." Linkletter v. Walker, 381 U.S. 618, 639 (1965). In contrast, where a collateral attack on a prior conviction does not involve complete denial of the right to counsel or a fundamental error of similar magnitude, Congress may rationally rely on the fact of the prior conviction as an indicator of the offender's likely dangerousness.7/

7/ We made the same point in our brief amicus curiae in Parke v. Raley, 113 S. Ct. 517 (1992). See No. 91-719 U.S. Br. 10-18. The Court did not reach that issue, however, because it had not been preserved in the courts below. See 113 S. Ct. at 522-523. The Court did, however, sustain Kentucky's career offender statute, which allowed collateral attacks at sentencing but placed the burden of production on the defendant. In so doing, the Court relied heavily on the fact that when a defendant challenges a prior final conviction in a subsequent sentencing proceeding, the predicate conviction is entitled to "the 'presumption of regu-

(continued...)

Petitioner's claims do not approach the level of fundamental error that the Court addressed in Burgett and Tucker. With respect to his 1985 Maryland conviction, petitioner claims that he received ineffective assistance in relation to his decision whether to plead guilty. Congress may rationally determine that a prior conviction is relevant to sentencing without the need to resolve such a claim. In general, this Court has explained that "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a case as they are to be prejudicial." Strickland v. Washington, 466 U.S. 668, 693 (1984). And where a guilty plea is involved, the interest in finality is greater, and "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised." Hill v. Lockhart, 474 U.S. at 58.[8/] A defendant challenging his guilty plea accordingly must establish not only constitutionally ineffective lawyering, but also "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted upon going to

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7/ (...continued)
larity' that attaches to final judgments, even when the question is waiver of constitutional rights." Id. at 523. The court also emphasized that "[f]or much of our history, it appears that state courts altogether prohibited defendants in recidivism proceedings from challenging prior convictions as erroneous, as opposed to void for lack of jurisdiction." Id. at 525. Those observations strongly support limiting the availability of collateral relief in this context.

8/ There is a presumption that counsel advised a defendant of everything needed to enter a voluntary and intelligent guilty plea. See Marshall v. Lonberger, 459 U.S. 422, 436-437 (1983); Henderson v. Morgan, 426 U.S. 637, 647 (1976).

trial." Id. at 59.[9/] In light of the strong presumption of finality that attaches to a conviction entered pursuant to a guilty plea, the heavy burden on the defendant seeking to overturn such a conviction, and the largely predictive nature of the inquiry into ineffective assistance of counsel, Congress is entitled to treat a prior final conviction as a rational sentencing factor without first allowing the defendant to litigate an ineffective-assistance-of-counsel claim that he could have, but did not, previously raise.

Petitioner also claims that his 1989 Maryland conviction was invalid because it resulted from a stipulated facts trial, and he was not advised of the rights he was waiving in agreeing to that procedure. That claim is based on this Court's decision Boykin v. Alabama, 395 U.S. 238 (1969), which requires state courts to place on the record facts showing that a defendant who pleads guilty is aware of certain rights being waived by entering that plea.[10/] Even if Boykin did extend to stipulated-facts trials, its prophylactic requirements do not rise to the level of fundamental error required to invoke Burgett and Tucker. See Parke v. Raley, 113 S. Ct. at 523 (holding that Boykin's presumption of invalidity does

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9/ This, in turn, will frequently require a prediction about the effect an attorney error might have had upon the trial. Thus, for example, where an attorney fails to advise his client of a possible defense, the prejudice inquiry "depend[s] largely on whether the affirmative defense likely would have succeeded at trial." Hill v. Lockhart, 474 U.S. at 59.

10/ In Boykin, the Court noted that a guilty plea waives (1) the privilege against compulsory self-incrimination, (2) the right to a jury trial, and (3) the right to confront adverse witnesses. The Court in Boykin declined to "presume a waiver of these three important federal rights from a silent record" on direct appeal. 395 U.S. at 243.

not extend to collateral attacks on final convictions); cf. United States v. Timmreck, 441 U.S. at 783 (technical violation of similar prophylactic requirements of Fed. R. Crim. P. 11 "is not a fundamental defect"); Halliday v. United States, 394 U.S. 831 (1969) (per curiam) (no retroactive application of decision construing Fed. R. Crim. P. 11).

Although the courts below therefore properly declined to consider petitioner's collateral challenge to his prior convictions, there is a conflict among the circuits on the extent to which the Constitution requires collateral relief to be available in this context.[11/] The court of appeals in this case held that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." Pet. App. 8a. Several other courts of appeals have recognized that collateral attacks upon a prior convictions used for sentencing are required

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11/ The question whether the Constitution requires that a defendant be allowed to collaterally attack a prior conviction used to enhance his sentence arises not only under the ACCA but also under the Sentencing Guidelines. As petitioner notes (Pet. 9 n.5), the courts of appeals are divided over whether the commentary to Guidelines § 4A1.2 requires district courts to entertain collateral attacks on prior convictions used to calculate sentences under the Guidelines. That issue of Guidelines interpretation does not warrant this Court's review because the Sentencing Commission has submitted an amendment to resolve the conflict. The amendment will take effect on November 1, 1993, unless Congress enacts legislation rejecting it. See 58 Fed. Reg. 27,148, 27,160 (May 6, 1993).

only in limited circumstances. See, e.g., United States v. Isaacs, No. 92-2129 (1st Cir. June 22, 1993), slip op. 15-16 ("unless a defendant's claim is that a prior conviction is unconstitutional on its face, the sentencing court has no constitutional authority to review that conviction before using it to enhance a defendant's [sentence]"); United States v. Roman, 989 F.2d 1117, 1120 (11th Cir. 1993) (en banc) (Constitution requires district courts to consider attack upon the validity of prior conviction only when defendant asserts facts showing that the conviction is "presumptively void"), petition for cert. pending, No. 93-5464; United States v. Elliott, 992 F.2d 853, 856-858 (8th Cir. 1993) (district courts must entertain collateral attack on prior conviction only when the alleged constitutional infirmity undermines a conviction's reliability as an indicator of guilt or erodes the authority relied on for the underlying claim of error), petition for cert. pending, No. 93-5570. On the other hand, in United States v. Vea-Gonzales, 986 F.2d 321, 327 (9th Cir. 1993), the Ninth Circuit broadly held that "the Constitution requires that defendants be given the opportunity to collaterally attack prior convictions that will be used against them at sentencing." In light of the conflict among the circuits on this important and recurring constitutional question -- as well as the related question of statutory interpretation (see pages 7-9, supra) -- we believe that this Court's review is appropriate.

2. Petitioner contends (Pet. 16-18) that his 1989 Maryland conviction for attempted breaking and entering does not qualify as

a predicate offense under the ACCA because it is not a "violent felony" conviction. The court of appeals correctly rejected that claim.

Under 18 U.S.C. 924(e)(2)(B)(ii), the term "violent felony" means any felony offense that "is burglary, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." In Taylor v. United States, 495 U.S. 575, 599 (1990), the Court held that a court making a determination under that provision should "look only to the fact of conviction and the statutory definition of the prior offense," and not "to the particular facts underlying th[e] conviction[]." Id. at 600, 602.

The court of appeals in this case properly applied Taylor in holding that the offense of attempted breaking and entering under Maryland law "presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). As the court of appeals explained, courts applying the categorical approach of Taylor "must necessarily make common-sense judgments about whether a given offense proscribes generic conduct with the potential for serious physical injury to another." Pet. App. 9a. Because breaking and entering under Maryland law requires "breaking and entering * * * into 'the dwelling house of another,'" the court explained that attempted breaking and entering usually "will be charged when a defendant has been interrupted in the course of illegally entering a home." Id. at 9a, 10a. Because that conduct carries with it a serious risk of confrontation with the occupant, the court below

correctly held that it constitutes a "violent felony." Id. at 10a; cf. Taylor, 495 U.S. at 588 ("The fact that an offender enters a building to commit a crime creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.").

Petitioner argues (Pet. 18) that further review is warranted to resolve a conflict among the circuits on the question whether attempted burglary constitutes a violent felony. To be sure, the Tenth Circuit in United States v. Strahl, 958 F.2d 980, 986 (1992), held that attempted burglary, as defined by Utah law, does not generically involve a serious potential risk of physical injury, because the offense may be based on "conduct such as making a duplicate key, 'casing' the targeted building, obtaining floor plans of a structure, or possessing burglary tools." Moreover, the Fifth Circuit in United States v. Martinez, 954 F.2d 1050, 1054 n.3 (1992), reached a similar conclusion because "under Texas law a defendant could be convicted of attempted robbery long before he encountered another person." In contrast, two courts of appeals have interpreted Massachusetts law, and one has construed Michigan law, in a way that categorizes "attempted burglary" as a "violent felony." United States v. O'Brien, 972 F.2d 47, 50-53 (3d Cir. 1992) (Massachusetts law), petition for cert. pending, No. 93-5095; United States v. Payne, 966 F.2d 4, 8-9 (1st Cir. 1992) (Massachusetts law requires "conduct closer to completing the offense, for example, coming onto the premises and being scared off or trying and being unable to break the lock"); United States v. Fish, 928

F.2d 185, 186-188 (6th Cir.) (Michigan law), cert. denied, 112 S. Ct. 115 (1991).

For two reasons, this case does not present an appropriate vehicle for addressing any divergence among the approaches of the courts of appeals. First, although petitioner argues that he is seeking further review to correct an alleged misapplication of the categorical approach of Taylor, the substance of his argument is instead that the court of appeals simply misread the Maryland law of attempt.[12/] Petitioner's contention (Pet. 17-18) that Maryland law, properly interpreted, is analogous to the state laws at issue in Strahl and Martinez is not an issue requiring this Court's review to ensure the uniformity of federal law. Second, even if petitioner prevailed in his motion to suppress the 1989 Maryland conviction, he would remain eligible for sentencing as a career criminal under Section 924(e). Apart from the convictions listed in the government's pretrial notice, the presentence report also indicates that petitioner was found guilty of a delinquent act involving first degree murder and use of a handgun in a Maryland juvenile adjudication. C.A. App. 277. Under Section 924(e)(2)(B), the term "violent felony" includes "any act of juvenile delinquency involving the use or carrying of a firearm, knife or destructive device that would be punishable by imprisonment for [more than one

12/ Consistent with Taylor's categorical approach, the court of appeals did not look to the particular facts of this case in making its determination under Section 924(e)(2)(B)(ii), but considered whether Maryland law defines attempted burglary in a way that generally points to a serious potential risk of physical harm. See Pet. App. 9a-10a.

year] if committed by an adult."[13/] Because the 1981 adjudication qualifies under that subsection, the government may rely on that conviction on remand if petitioner's 1989 conviction is excluded on the ground that it is not a violent felony conviction under Maryland law.

CONCLUSION

The petition for a writ of certiorari should be granted with respect to Question No. 1. In all other respects, the petition should be denied.

Respectfully submitted.

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SEPTEMBER 1993

13/ Petitioner did not contest in the courts below that the 1981 juvenile adjudication qualified as a "violent felony" under the ACCA, but argued that the government was not entitled to rely upon it because it had not been included in the original notice. See Gov't C.A. Reply Br. 13-14. The ACCA, however, does not require the government to provide a defendant with formal notice of the predicate convictions upon which it will rely under Section 924(e). See United States v. Alvarez, 972 F.2d 1000, 1006 (9th Cir. 1992), cert. denied, 113 S. Ct. 1427 (1993). In any case, petitioner was given notice of the juvenile adjudication in his presentence report, more than a month before sentencing. Gov't C.A. Reply Br. 13.

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V.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by first-class mail, postage prepaid, this 15th day of SEPTEMBER 1993.

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September 15, 1993

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